

Does tendering create travesties of justice?

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Transforming Legal Aid: Does Price Competitive Tendering Potentially Create Travesties of justice?

Lucy Welsh considers the potential effects of the government's proposals to reform publicly funded access to justice in criminal proceedings.

Introduction

Legal aid in criminal proceedings exists to avoid defendants being presented as victims of an overbearing state, which assumes that "the two sides have access to roughly equivalent resources and expertise" (Young *et al*, 1996; 5). Recent governments have however focussed on value for money, which ignores political debate about what actually constitutes value in specific circumstances. It is against this background that the Ministry of Justice released its consultation paper including proposals to introduce Price Competitive Tendering ('PCT') in most criminal proceedings.

Under the PCT model, the government proposes to invite firms to bid for a market share of criminal defence work. The successful bidders will be entitled to an 'equal' 'market' share. So in Kent, where it is proposed there will be five providers, each successful firm will be allocated a twenty per cent share of the work, although allocation processes remain undetermined. In crude terms, the firms which offer to do the work at the lowest price will be awarded the contracts. The accused person might (in a government u-turn) retain choice about which provider will provide representation, but it will be near impossible to change provider after initial allocation. That allocation is supposed to take place at the investigation stage but it is not clear what will happen to the significant number of people who choose to be unrepresented at the police station but subsequently seek out a lawyer after being charged with a criminal offence. All bids are to be capped at 17.5% of 2012/13 payment rates, so all current providers who bid will have to demonstrate a real cut in fee income. The government suggests that the volume of work conducted will enable firms to make economies of scale, but does not suggest how this might actually be achieved.

Money matters

When the report of the Rushcliffe Committee was published as the precursor to the Legal Aid and Advice Act 1949, it made clear that advocates who were funded to represent defendants via legal aid should receive 'adequate remuneration' because the adversarial process depends on the parties' ability to access resources to adequately prepare their case. The proposal to introduce PCT flies in the face of that acknowledgment. Profit margins for publicly funded providers of representation in criminal proceedings are already very slim (Grindley, 2006) resulting in a fragile market which is unlikely to be able to withstand the introduction of radical reforms. This would result in long term sustainability problems (Grindley, 2006). There have been further cuts since Grindley (2006) conducted his analysis. While the consultation document suggests that bids which appear to be unusually low would require firms to demonstrate sustainability, it is impossible to predict this

given the uncertainties of work volumes and overhead expenses. Furthermore, there is no acknowledgement that, after the initial round of contracts and loss of significant numbers of firms from the market, those firms that are left will be in a strong position to increase their bid prices disproportionately. There will be little ability for new providers to enter a market which has already been allocated among providers as a result of the significant overheads required to establish a firm large enough to cover bid areas, meaning that competitive threat from other practices will be at a minimum. From a policy perspective, this potentially places providers in a strong position against the Legal Aid Agency.

Efficiency and Quality

The efficiency of the criminal justice system largely depends on the co-operative practices that exist between advocates and the court. There is a wealth of information which supports the idea that the presence of lawyers facilitates the smooth administration of the proceedings (see, for example, Young *et al*, 1996). Indeed, co-operative working practices have been encouraged by policy initiatives such as Criminal Justice: Simple, Speedy, Summary and Stop Delaying Justice! While the proposals do not suggest otherwise, what they failed to recognise is that, via the removal of client choice (which reduces the need to provide a good service) and 'guaranteed' levels of work (the existence of which is not accepted), there is no incentive on defence advocates to co-operate with the courts, or initiatives that the government proposes, as professional reputations no longer matter. Streamlining practices so that less time is spent on cases in attempts to achieve economies of scale does not necessarily mean that practitioners will co-operate to get cases dealt with quickly. Less time is likely to be spent on cases, which may result in inadequate preparation and longer term inefficiencies such as an increase in the number of ineffective trials. Furthermore, the socio-economic costs of potential miscarriages of justice which could occur do not appear to have been considered.

Kemp (2010) noted that changes in payment regimes can affect the behaviour of solicitors who are torn between cost control measures and quality of service. The introduction of PCT, and the proposed reduction in funding in those areas not subject to PCT, are likely to exacerbate such problems. Furthermore, low levels of remuneration not only have a detrimental impact on the quality of advice and representation received, but also exacerbate the problems that already exist in attracting new trainees to the profession (Kemp, 2010) which will have an impact on diversity.

There is no incentive under PCT to provide a good quality service as the only thing that matters is cost. In order to monitor the professions, the government seeks to rely on measures such as Lexcel or the Specialist Quality Mark (regimes which require certain prescribed activities and standards to be met in order to be awarded a 'quality mark'), processes of peer review or the Quality Assurance Scheme for Advocates (in which advocates state which level of advocacy they are able to perform

and are then reviewed). The requirements of Lexcel and Specialist Quality Mark are management tools unrelated to actual quality of advice and representation. Peer Review was only conducted on the basis of file reviews rather than an evaluation of performance in person. The future of the Quality Assurance Scheme for Advocates is in turmoil following threats of strike action by the criminal Bar. The defendant can therefore be assured of good management, but not necessarily of good advice. However, Article 6 European Convention on Human Rights ('ECHR') requires member states to provide access to publicly funded defence services for those accused of crimes that cannot afford to pay for representation. It is not just the provision of a lawyer that matters – the defendant must be able to access resources which enable effective participation in the proceedings and have access to adequate resources to properly prepare his or her case. There is no incentive under PCT to provide a good quality service as the only thing that matters is cost. The quality control mechanisms proposed by the government are insufficient to monitor the quality of legal advice and advocacy services. Therefore, the proposals place the UK at risk of breaching the provisions of the ECHR to provide adequate resources in the preparation of defences.

Reductions in the quality of legal services as a result of competitive tendering have been recorded in other jurisdictions that have introduced similar models (Goriely, 1998). In addition, Hynes and Robins found "there is evidence from the experience of contracting for criminal legal aid services in North America to indicate that there are reductions in quality and the creation of cartels which lead to an increase in costs" (Hynes *et al*, 2009; 55). This is because the proposals are based on "an overly simplistic belief in 'the market' being able to sort out the problem. But there was a failure to understand what 'the problem' was, that the publicly funded legal sector has evolved in a complex and haphazard fashion, and is one that will not withstand shocks" (Hynes *et al*, 2009; 57). The difficulty exists because the criminal justice system is, quite simply, not a rational market – it is almost impossible to quantify how many people will require representation and what their needs will be. It is therefore unlikely that the system could 'guarantee' levels of work to a degree that would allow for effective business planning.

Conclusions

The Ministry of Justice suggests that PCT is a painful but necessary measure to reduce expenditure and improve public confidence in the system. There is no evidence that the public lack confidence in the system. Further, the government has failed to properly examine sources of expense in summary criminal proceedings. Cape and Moorhead note several factors which have increased cost - such as increased case complexity resulting in increased trial length and changes in prosecutorial decision making (Cape *et al*, 2005). The government does not appear to have considered these issues in its desire to reduce expenditure. Instead the government seeks to impose managerial influences which represent "a challenge to the direct relationship with the client" (Young *et al*, 1996; 23) in favour of conveyor belt processing and deskilling (Young *et al*, 1996).

Furthermore, the rapidity with which it is proposed that this scheme will be implemented will not allow the already fragile market to make the significant structural changes necessary for PCT to be sustainable in the long term, meaning that any potential savings are at risk of being offset by the problems which emerge at later stages. There is a real risk that the prioritisation of management and economic imperatives over principled decision making will result in miscarriages of justice – and that is only if the criminal justice system remains viable at all.

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